

1 The Honorable Robert S. Lasnik
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 JEFF MILLS, Individually and On Behalf of All
10 Others Similarly Situated,

11 Plaintiff,
12 v.

13 L&L ENERGY, INC., DICKSON V. LEE,
14 JUNG MEI (ROSEMARY) WANG, AND
IAN G. ROBINSON,

15 Defendants.

Case No. 2:11-cv-01423-RSL

CLASS ACTION

MOTION OF THE EVALDEZ FAMILY
FOR APPOINTMENT AS LEAD
PLAINTIFF AND APPOINTMENT OF
LEAD COUNSEL; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

NOTE ON MOTION CALENDAR:

Date: November 11, 2011

ORAL ARGUMENT REQUESTED

20 Randolph and Cheryl Evaldez (the “Evaldez Family” or “Movant”) hereby move this
21 Court, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange
22 Act”), as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15
23 U.S.C. § 78u-4(a)(3)(B), for an Order appointing Movant as Lead Plaintiff on behalf of itself and
24 all others similarly situated who purchased or otherwise acquired the common stock of L&L
25 Energy, Inc. (“L&L” or the “Company”) between August 13, 2009 and August 2, 2011, inclusive
26 (the “Class Period”). Movant also seeks appointment of the law firm of Cohen Milstein Sellers

1 & Toll PLLC (“Cohen Milstein”) as Lead Counsel for the Class and appointment of the law firm
 2 of Keller Rohrback, L.L.P. (“Keller Rohrback”) as Liaison Counsel. This Motion is based on the
 3 accompanying Memorandum in support thereof and the Declaration of Juli E. Farris filed
 4 herewith.

5 **I. INTRODUCTION**

6 The Evaldez Family’s motion should be granted. As shown below, this motion is timely
 7 as it is filed within 60 days of the first published notice of this class action litigation against
 8 Defendants. Furthermore, Movant believes that it is the “most adequate plaintiff” within the
 9 meaning of the PSLRA because it has the largest financial interest of any Lead Plaintiff movant
 10 in the relief sought by the proposed Class and otherwise meets the requirements of Fed. R. Civ.
 11 P. 23(a). Movant’s selection of Cohen Milstein as Lead Counsel and Keller Rohrback as Liaison
 12 Counsel should also be approved, as each of the firms has substantial experience prosecuting
 13 securities class action litigation.

14 **II. SUMMARY OF THE ALLEGATIONS AGAINST THE DEFENDANTS**

15 L&L purports to engage, through its subsidiaries, in coal mining, clean coal washing,
 16 coal coking, and coal wholesaling businesses in China. The Company’s coal products include
 17 washed coal and metallurgical coke used primarily for steel manufacturing.

18 The complaint filed in this action alleges that L&L and certain of its officers and/or
 19 directors (“Defendants”) made false and misleading statements regarding the Company’s internal
 20 controls and true business and financial condition.

21 On July 29, 2011, L&L filed an amendment to its 2010 10-K, detailing internal control
 22 deficiencies at the Company. In particular, the Company disclosed:

23 The Company did not maintain effective controls over its process to
 24 ensure the timely completeness and accuracy of the preparation and
 25 review of its consolidated financial statements. This resulted in several
 26 adjustments to the Company’s consolidated financial statements,
 principally including timely transfer of completed construction projects to
 property, plant and equipment, as well as reclassification of negative

1 balances in accounts payable and accounts receivable. It was also
 2 determined that the Company's entity level controls were not adequately
 3 designed and that weaknesses were noted in the financial reporting
 4 process.

5 In our opinion, because of the effect of the material weakness described
 6 above on the achievement of the objectives of the control criteria, L&L
 7 Energy, Inc. and its subsidiaries have not maintained effective internal
 8 control over financial reporting as of April 30, 2010....

9 On the morning of Monday, August 1, 2011, L&L released its financial results for the
 10 fiscal year ending April 30, 2011. Although the Company reported that revenues for the year
 11 had doubled to \$224 million, it missed its net income guidance for the fiscal year, reporting
 12 earnings per share of \$1.21 compared with its previous guidance of \$1.61. The price of L&L
 13 shares fell from \$4.96 to \$4.17 on August 1, representing a decline of approximately 16%.

14 On August 2, 2011, Glaucus Research Group issued a report with a "Strong Sell"
 15 recommendation stating that L&L was worth less than \$1.00 per share. In its report, Glaucus
 16 asserted that: (1) discrepancies between the Company's SEC filings and Chinese SAIC
 17 regulatory filings "suggest that the Company has been greatly exaggerating its net sales, net
 18 income and the value of its assets"; (2) Chinese regulatory filings show that certain assets L&L
 19 claimed to have acquired are not actually held in the Company's name but instead are held by the
 20 Company's Chairman and CEO, Dickson Lee; and (3) Dickson Lee has a "checkered history of
 21 allegedly making material misrepresentations to investors in connection with the sale of LLEN
 22 stock," noting that Lee has been charged by regulators on five separate occasions between March
 23 2006 and April 2009 with violating securities laws.

24 L&L's share price rose from \$4.17 to \$4.84 on August 2, and then dropped to \$4.46 on
 25 August 3 and \$4.00 on August 4. The Company's stock now trades at \$2.39 per share, down
 26 from a Class Period high of \$14.29 on April 6, 2010.

1 **III. THE EVALDEZ FAMILY SHOULD BE APPOINTED LEAD PLAINTIFF**

2 **A. The Procedure for Appointment of Lead Plaintiff Under the PSLRA**

3 The PSLRA sets forth the procedure governing the appointment of lead plaintiff in each
 4 private action arising under the Exchange Act that is brought as a plaintiff class action pursuant
 5 to the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(1). Under the first step of this
 6 procedure, the plaintiff who files a putative class action under the Act must publish a notice
 7 advising members of the purported plaintiff class of the: (i) pendency of the action; (ii) claims
 8 asserted therein; (iii) purported class period; and (iv) option of any member of the purported
 9 class to move to serve as lead plaintiff of the purported class not later than 60 days after the date
 10 on which the notice is published. *See* 15 U.S.C. § 78u-4(a)(3)(A).

11 Under the PSLRA, the Court is then required to appoint as lead plaintiff the “most
 12 adequate plaintiff,” which the PSLRA defines as “the member or members of the purported
 13 plaintiff class that the court determines to be most capable of adequately representing the
 14 interests of class members.” *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA further provides:

15 [T]he court shall adopt a presumption that the most adequate plaintiff in any
 16 private action arising under this subchapter is the person or group of persons that:

17 (aa) has either filed the complaint or made a motion in response to a notice
 18 under subparagraph (A)(i);

19 (bb) in the determination of the court, has the largest financial interest in
 20 the relief sought by the class; and

21 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of
 22 Civil Procedure.

23 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).¹ *See Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1048

24 (N.D. Cal. 2001); *see also In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002).

25 ¹ Pursuant to the PSLRA, the:

26 presumption [of the plaintiff with the largest loss being lead plaintiff] may be rebutted only upon proof by a
 member of the purported plaintiff class that the presumptively most adequate plaintiff:

 (aa) will not fairly and adequately protect the interests of the class; or

 (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

1 **B. The Notice Requirements Under the PSLRA Have Been Satisfied**

2 The notice requirements set forth in the PSLRA have been satisfied. On August 26,
 3 2011, counsel for Plaintiff Mills caused a notice to be published that advised purchasers of L&L
 4 stock of (i) the pendency of a securities class action against Defendants; (ii) the claims asserted;
 5 (iii) the purported class period in that litigation; and (iv) the right of any member of the
 6 purported class to move the court to serve as lead plaintiff within sixty days (the “Notice”).²
 7 *Cf. In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 216 (D.N.J. 1999); *In re Milestone Scientific Sec.*
 8 *Litig.*, 183 F.R.D. 404, 413 (D.N.J. 1998); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 62-63
 9 (D. Mass. 1996).

10 **C. The Evaldez Family Has the Largest Financial Interest in the Relief Sought By the
 11 Class**

12 The Evaldez Family believes that it has “the largest financial interest in the relief sought
 13 by the class” within the meaning of the PSLRA. According to the information provided in its
 14 Certifications (*see* Farris Decl. Ex. B), the Evaldez Family purchased 10,590 shares of L&L
 15 during the Class Period for \$109,388. The Evaldez Family suffered estimated losses of \$61,458.
 16 Movant knows of no other persons who have sought to be Lead Plaintiff in this action who
 17 possess a larger financial interest.

18 **D. The Evaldez Family Has Satisfied the Other Requirements of the PSLRA**

19 The Evaldez Family has satisfied each of the other requirements of the PSLRA. First,
 20 Mr. and Mrs. Evaldez have signed Certifications, under oath, which:

21 (i) state that they have reviewed the Complaint;
 22 (ii) state that they did not purchase the securities of L&L at the
 23 direction of plaintiff’s counsel or in order to participate in any private
 24 action arising under the federal securities laws;

25

26 ² A copy of the Notice is attached as Exhibit A to the Declaration of Juli E. Farris in Support of the Evaldez
 Family’s Motion for Appointment as Lead Plaintiff and Appointment of Lead Counsel (“Farris Decl.”).

(iii) state that they are willing to serve as representative parties on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) set forth all of their transactions in the securities of L&L during the Class Period;

(v) state that they have not sought to serve, nor have they served, as representative parties on behalf of a class in any private federal securities action; and

(vi) state that they will not accept any payment for serving as representative parties on behalf of the class beyond their *pro rata* share of any recovery.

See 15 U.S.C. § 78u-4(a). Movant has also satisfied the PSLRA by moving for appointment as lead plaintiff within sixty (60) days after the date on which the Notice was first published. *See id.*

Second, the Evaldez Family satisfies the requirements of Fed. R. Civ. P. 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Rule 23(a) is satisfied for the purposes of this motion where (i) the claims of the proposed lead plaintiff are typical of the claims of the class; and (ii) the proposed lead plaintiff will fairly and adequately protect the interests of the class. *Armour*, 171 F. Supp. 2d at 1051.³

The Evaldez Family satisfies the “typicality” and “adequacy” requirements of Rule 23(a). Under Rule 23(a)(3), the “typicality” requirement is satisfied where the claims of the proposed class representative arise from the same course of conduct that gives rise to the other class members’ claims, where these claims are based on the same legal theory, and where the class members and proposed class representative were injured by the same conduct. *See Armour*, 171 F. Supp. 2d at 1052 (citing *Hannon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

³ Although there are two other requirements under Fed. R. Civ. P. 23(a) – that the class be so numerous that the joinder of all members is impracticable (Fed. R. Civ. P. 23(a)(1)) and that there be questions of law or fact common to the class (Fed. R. Civ. P. 23(a)(2)) – “[t]ypicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.” *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998).

1 The “adequacy” requirement of Rule 23(a)(4) is satisfied when the proposed class representative
 2 does not have interests antagonistic to the proposed class, and where the proposed class
 3 representative has retained experienced and capable counsel. *In re Emulex Corp. Sec. Litig.*, 210
 4 F.R.D. 717, 720 (C.D. Cal. 2002).

5 In this action, the Evaldez Family’s claims are typical of the claims of all Class members.
 6 Like all Class members, the Evaldez Family suffered damages from its purchases of L&L
 7 securities as a result of Defendants’ false and misleading representations concerning the
 8 Company in violation of the Exchange Act. Furthermore, the Evaldez Family’s interests are
 9 clearly aligned with those of the members of the Class, and there is no evidence of any
 10 antagonism between the Evaldez Family’s interests and those of the Class. In addition, Movant
 11 understands its obligations as Lead Plaintiff and is prepared to act as a fiduciary on behalf of the
 12 Class and to vigorously prosecute this case on behalf of the Class. *See* Farris Decl. Ex. B. Also,
 13 Movant’s counsel will vigorously seek to protect the interests of the Class. All these factors
 14 demonstrate that Movant’s claims are typical of the claims of the Class within the meaning of
 15 Rule 23(a)(3), and that it will fairly and adequately represent the interests of the Class under
 16 Rule 23(a)(4).

17 **IV. THE COURT SHOULD APPROVE MOVANT’S CHOICE OF COUNSEL**

18 The PSLRA expressly provides that the “most adequate plaintiff shall, subject to the
 19 approval of the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-
 20 4(a)(3)(B)(v). The Evaldez Family has selected Cohen Milstein as Lead Counsel because of its
 21 extensive experience litigating securities class actions, in particular against companies, like L&L,
 22 with operations in China. The Court should therefore appoint Cohen Milstein as Lead Counsel.⁴
 23 The Court should also appoint Keller Rohrback as Liaison Counsel. Both firms have the
 24

25 ⁴ On September 12, 2011, the Court appointed Cohen Milstein as lead counsel in *Moomjy v. HQ Sustainable*
 26 *Maritime Industries, Inc.*, No. 11-0726 RSL – another case involving against a company with operations in China.
 Cohen Milstein has also been appointed to serve as lead counsel in other securities class actions in this District,
 including *In re Washington Mutual Mortgage-Backed Sec. Litig.*, No. 09-0037 MJP (Pechman, J.) and *Fouad v.*
Isilon Sys., Inc., No. 07-1764 MJP (Pechman, J.).

1 expertise and resources to effectively litigate this case on behalf of the Class. *See* Cohen
2 Milstein and Keller Rohrback firm resumes, Farris Decl. Exs. C and D. Thus, the Court may be
3 assured that the members of the Class will receive the highest caliber of legal representation.

4
5 **V. CONCLUSION**

6 For the foregoing reasons, the Evaldez Family respectfully requests that this Court
7 appoint it to serve as Lead Plaintiff and approve its selection of Cohen Milstein as Lead Counsel
8 and Keller Rohrback as Liaison Counsel.

9 DATED this 25th day of October, 2011.

10
11 KELLER ROHRBACK L.L.P.
12

13 /s/ Lynn Lincoln Sarko
14 /s/ Juli E. Farris
15 /s/ Elizabeth A. Leland
16

17 Lynn Lincoln Sarko, WSBA # 16569
18 Juli E. Farris, WSBA #17593
19 Elizabeth A. Leland, WSBA # 23433
20 1201 Third Avenue, Suite 3200
21 Seattle, WA 98101-3052
22 Telephone: (206) 623-1900
23 Facsimile: (206) 623-3384

24
25 ***Proposed Liaison Counsel***

26
27 COHEN MILSTEIN SELLERS & TOLL PLLC

28 Steven J. Toll
29 Daniel S. Sommers
30 S. Douglas Bunch
31 1100 New York Avenue, N.W.
32 Suite 500, West Tower
33 Washington, D.C. 20005
34 Telephone: (202) 408-4600
35 Facsimile: (202) 408-4699

36
37 ***Counsel for the Evaldez Family and Proposed
38 Lead Counsel***

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2011, I electronically filed the

MOTION OF THE EVALDEZ FAMILY FOR APPOINTMENT AS LEAD PLAINTIFF AND APPOINTMENT OF LEAD COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; [PROPOSED] ORDER APPOINTING LEAD PLAINTIFF AND LEAD COUNSEL

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses registered, as denoted on the attached list, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to non CM/ECF participants on the list below:

Eric D Lowney knoll@igc.org

Laurence M. Rosen lrosen@rosenlegal.com

Phillip C. Kim pkim@rosenlegal.com

Richard Adam Smith rasmithwa@igc.org

Lynn Lincoln Sarko lsarko@kellerrohrback.com, cengle@kellerrohrback.com

Juli E. Farris jfarris@KellerRohrback.com, lbachmann@kellerrohrback.com

Elizabeth Ann Leland bleland@kellerrohrback.com, dwilcher@kellerrohrback.com

Clifford A Cantor cacantor@comcast.net

/s/ Juli E. Farris

Juli E. Farris, WSBA #17593

MOTION OF THE EVALDEZ FAMILY FOR
APPOINTMENT AS LEAD PLAINTIFF AND
APPOINTMENT OF LEAD COUNSEL
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LAW OFFICES OF
KELLER ROHRBACK, L.L.P.
1201 THIRD AVENUE, SUITE 3200
SEATTLE, WASHINGTON 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

LAW OFFICES OF
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 NEW YORK AVENUE, N.W.
SUITE 500, WEST TOWER
WASHINGTON, DC 20005
TELEPHONE: (202) 408-4600